S.C.C. No. 01275

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Macdonald, Pace and Matthews, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - LLOYD FRANCIS GRANDY Respondent	Martin E. Herschorn for the Appellant Craig M. Garson for the Respondent Appeal Heard: November 25, 1985 Judgment Delivered: December 5, 1985

THE COURT: Application for leave to appeal against sentence granted appeal allowed and sentence varied from four to nine years on a charge of robbery and from one to three years for a violation of s. 83 of the Criminal Code.

Macdonald, J.A.:

On May 13th, 1985 the Respondent Lloyd Francis Grandy upon being arraigned on a four count bill of indictment pleaded guilty to the following counts:

> "1. That he at or near Halifax, in the County of Halifax, Nova Scotia, on or about the 30th day of October, 1984, did unlawfully rob Heather Roberts, contrary to Section 303 of the Criminal Code.
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> 2. That he at or near Halifax, in the County of Halifax, Nova Scotia, on or about the 30th day of October, 1984, did unlawfully use a firearm while committing an indictable offence, contrary to Section 83(1)(a) of the Criminal Code.
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> 3. That he at or near Halifax, in the County of Halifax, Nova Scotia, on or about the 30th day of October, 1984, did unlawfully discharge a firearm at Stephen Roberts with intent to wound, contrary to Section 228(a) of the Criminal Code.
>
> 4. That he at or near Halifax, in the County of Halifax, Nova Scotia, on or about the 30th day of October, 1984, did unlawfully discharge a firearm at David Cotie with intent to wound, contrary to Section 228(a) of the Criminal Code."

On May 31st of this year Mr. Grandy was sentenced by Mr. Justice Nunn to a term of imprisonment of four years on the first count, to a consecutive one year term of imprisonment on the second count and to concurrent one year terms of imprisonment on the third and fourth counts, for a total custodial sentence of five years.

The Crown now applies for leave to appeal and if leave be granted appeals against the sentences on the grounds that they inadequately reflect the element of deterrence and are inadequate having regard to the nature of the offence committed and the circumstances of the Respondent.

Counsel for the Respondent stated in his factum that he admits the following statement of facts contained in the Appellant's factum:

> "1 On October 30, 1984 at approximately 10:20 a.m., an armed robbery occurred at the premises of G.& F. Roberts Jewellery Limited, located at 1709 Barrington Street, in the City of Halifax. At that time, three men, the Respondent, a co-accused, Terry Wayne Sonier and another individual enter the premises. The Respondent was armed with a sawed-off shotgun, the co-accused Sonier was armed with a hunting knife and third individual was armed with a baseball bat.
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> 2 Mrs. Heather Roberts, wife of the owner, was at the front counter and as she looked up she observed a sawed-off shotgun in her face. The Respondent yelled 'This is for real. This is a hold up'. In the meantime, the other two armed men burst into the backroom yelling at the four male occupants to lie on the floor. During this process, the third individual hit two of the workers with the bat while the co-accused, Sonier, started to take gold chains out of the showcase in the front of the store.
>
> 3 Mr. Stephen Roberts, the owner, managed to lock the door to a large safe and upon hearing the click of the safe door closing, the third individual demanded Mr. Roberts open the safe door. As he tried to do so, he struck Mr. Roberts twice with the baseball bat. A scuffle ensued between Mr. Roberts and this third man, as a result of which, Mr. Roberts managed to get the bat away from him. At this point, the co-accused, Sonier, abandoned his attempts to place valuables in a bag he was carrying and ran down the stairs. The third man extricated himself from the scuffle with

> Mr. Roberts and fled down the stairs as well. Mr. Roberts, bat in hand, was then facing the Respondent at which point Grandy discharged the weapon at Mr. Roberts, striking him in the right upper thigh area. A second person, Mr. David Cote, who was lying on the floor at the time, was also hit by shotgun pellets in the left heel and right ankle area.
>
> 4 Mr. Roberts then pursued the intruders down the stairs to the Barrington Street level, but all three made good their escape. All the weapons as well as nylon masks were dropped at the scene."

We were advised on the hearing of this appeal by Crown counsel that the injuries sustained by Mr. Roberts were fortunately not severe. He was struck in the area of the right thigh by at least one dozen shotgun pellets, which inflicted superficial wounds only.

It is difficult on these facts to say whether the shooting was extranious to the robbery or in furtherance of it. If it were done to further the act of robbery then the convictions on the third and fourth counts would appear to infringe the rule against multiple convictions enunciated in Kienapple v. The Queen,[1975] 1 S.C.R. 729, 15 C.C.C. (2d) 524. See also R. v. Allison and Dinel (1983), 5 C.C.C. (3d) 32. This issue was not raised on the appeal and I assume that the Crown theory and defence position must have been that the shooting was extrinsic to the robbery and not in furtherance of it. From the perspective of sentence totality it is really of no great consequence whether the shooting was part of the act of robbery or was separate therefrom.

The Respondent was 19 years of age when he committed the present offences. He is single and has a grade 10 education. He graduated in June 1983 from a plumbing course at the Halifax Vocational School. According to a pre-sentence report prepared in December 1983, he never has been employed, although he advised an adult probation officer that he has made efforts to find work. He does have a previous criminal record dating back to 1982. Details of this record are as follows:

DATE/PLACE OF SENTENCE	**CHARGE**	**DISPOSITION**
1982-10-08 Halifax NS	BE with intent Sec 306(1)(a) CC (2 chgs)	Probation for 2 yrs on each chg
1983-06-28 Halifax NS	(1) Theft under $200 Sec 294 (b) CC (2 chgs)	(1) 30 days on each chg consec
	(2) Poss stolen property over $200 Sec 313(a) CC	(2) 30 days
1983-12-08 Halifax NS	(1) BE with intent Sec 306(1) (a) CC	(1) 6 mos
	(2) Poss of a restricted drug Sec 41(1) FD Act	(2) $200 plus costs I-D 30 days
1985-04-03 Halifax NS	(1) BE & commit	(1-2) 2 yrs on each chg
	(2) BE with intent	

Mr. Justice Nunn referred to the seriousness of the offences - "It is only by chance that someone was not killed..." -. He then alluded to some factors favourable to Mr. Grandy as set out in the pre-sentence report, namely that he is a good student, that he comes from a good home and that his parents are supportive of him. Mr. Justice Nunn then noted that although great emphasis in robbery sentences must be placed on deterrence he did not dis-

count the possibility that the Respondent could be rehabilitated.

Mr. Justice Nunn then went on to say:

> "...In my view, armed robbery is an offence which requires great emphasis on the factor of deterrence. You and the other members of the public must know clearly that this offence will not be accepted. But I do not discount in your case the possibility of rehabilitation...
>
> ... Normally, for an armed robbery situation such as this where there was a firearm and the firearm was discharged, it would not be out of line to sentence you to a term of ten years or more in a Federal Penetentiary. Not out of line at all, and that should emphasize to you the seriousness of this particular offence. But I am not going to impose that long a sentence on you because I do not think that you should be written off at this particular stage of your life...
>
> ...I am taking into account the fact that you are already serving a two-year term which has just been imposed upon you a few months prior. Taking that into account that there is a hope for your rehabilitation and it is up to you to make the genuine effort to do so in the next while..."

The prevention of crime is of course the basis or justification for criminal sanctions and the fundamental objective of any sentence is the protection of the public or as some courts have expressed it, the protection of the interests of the community. This court on many occasions has said that the protection of the public by way of the sentencing process can best be attained by a sentence that has as its primary consideration the element of deterrence or by a sentence that has as its primary consideration the reformation and rehabilitation of the offender or by a sentence that reflects both the element of deterrence and that of rehabilitation. The real problem

arises in deciding which of the factors of rehabilitation or deterrence ought to be emphasized in a particular case. Generally speaking the answer will be found upon analysis of the objective and subjective gravity of the offence and the background and circumstances of the offender.

The objective gravity of the offence of robbery is expressed in s. 303 of the Code. That section makes those who commit robbery liable to imprisonment for life. In its subjective sense the gravity of the offence relates to its nature, the manner in which it was committed and all the circumstances surrounding it. Here the offence viewed subjectively was very grave. The crime was obviously planned. The three participants were masked and armed with different weapons. The Respondent had a sawed-off shotgun that was loaded and which he discharged at Mr. Roberts at literally point blank range, wounding the latter and also a customer who happened to be on the premises at the time.

The main mitigating factor here is the age of the Respondent, but to my mind this is offset by the magnitude of his crime. I find support for my view in the judgment of the British Columbia Court of Appeal in Regina v. Nutter, Collishaw and Dulong (1970), 7 C.C.C. (2d) 224. The three accused in that case pleaded guilty to the armed robbery of a trust company and two relating offences arising from the incident. They were 19, 22 and 25 years of age and none had a serious criminal record. The trial judge sentenced both Nutter and Collishaw to three years imprisonment on the robbery charge. Dulong received a sentence of two years less a day plus probation for the robbery offence. The

Court of Appeal increased the sentences for each of the three to twelve years imprisonment. The judgment of the Court was delivered by Mr. Justice Tysoe who said in part:

> "I do not think the ages of persons makes much difference when they are committing these violent crimes. Young men who persist in committing crimes of this sort cannot expect that their ages will be regarded as mitigating circumstances. We are in a period now where, as I have already said, there is a rash of crimes of violence. This is no time for softness and sentimentality to govern in the imposition of sentences for offences of this sort.
>
> Only the day before yesterday this court had before it a sentence of 10 years' imprisonment imposed on a man in his thirties for knocking another man over the head and stealing $750 from him. This court refused to reduce the sentence.
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> Crimes of this sort will not be stopped if men who commit them run the risk of only comparatively short terms of imprisonment. The Judges owe a duty to the community and to protect them as best they can and to impose sentences that will constitute real deterrence. I stress the word 'real' deterrence not only to the persons who have committed the crimes, but to persons who might tend or be disposed to think about committing them."

Apart from the circumstances of the crime the fact that the Respondent has a previous criminal record also tends to offset the mitigating affect of youth - R. v. Hingley (1977), 19 N.S.R. (2d) 541.

Mr. Justice Nunn took into account in mitigation the fact that Mr. Grandy might yet be rehabilitated and the fact that he was at the time under a sentence of two years imprisonment. It will be recalled that this sentence was imposed upon the Respondent

for offences which he committed while on bail awaiting trial on the robbery and related charges. Instead of being a factor in mitigation such is to my mind one of aggravation. I do agree with Mr. Justice Nunn that one cannot write the Respondent off at this stage, yet to my mind the learned trial judge erred in principle in that he over emphasized the element of rehabilitation with a resulting under emphasis of the principle of general deterrence. There can be no doubt that in cases of violence rehabilitation and individual deterrence must give way to general deterrence - R. v. Perlin (1977), 23 N.S.R. (2d) 66 at page 69.

It remains therefore to consider what is a fit and proper sentence for these particular offences by this particular offender.

Sentencing involves such a mix of factors, many personal to the offender that no rigid rules can be laid down for determining, for the purposes of uniformity, the type and length of sentences. The principle of proportionality however dictates that a sentence must be proportionate to the crime. In other words punishment must not be excessive, but must always be related to the seriousness of the offence. A practical guide to what is fit and not excessive is the range of sentences imposed for similar offences within a period reasonably contemporanious with the commission of the offence. It is for such reason only that I would refer to the following cases.

In R. v. MacDonnell (1980), 42 N.S.R. (2d) 225, the accused age 27 robbed a credit union while armed with a sawed-off shotgun. He had fourteen previous convictions for criminal offences

including one for robbery with violence. This court dismissed his appeal against a ten year sentence for the robbery and a concurrent two year sentence for a violation of s. 83 of the Criminal Code.

In R. v. Canning (1984), 65 N.S.R. (2d) 326 the accused was convicted of robbery and of using a firearm in the commission of an indictable offence. The facts were that he and others took part in a planned robbery of a private residence. When one of the residents resisted the accused shot him in the leg causing permanent injury. Mr. Canning was 27 years of age at the time of the robbery and he had a substantial prior criminal record. He was sentenced to eight years imprisonment for the robbery and to a consecutive four year term of imprisonment for using a firearm in the commission of the offence. An appeal from the total sentence of twelve years was dismissed by this court which stressed that the primary consideration had to be that of deterrence.

The reported cases from other jurisdictions indicate that the sentences approved by this court in the MacDonnell and Canning cases were on their facts not excessive.

In R. v. Dube (1976),32 C.C.C. (2d) 536 the accused and another robbed a branch of the Bank of Montreal located in the City of Toronto. The accused was armed at the time with a sawed-off semi-automatic .22 caliber rifle. The rifle was loaded with one live round in the breach and six live rounds in the clip. The accused was 25 years of age and the father of two children. He had one previous criminal conviction, that being for theft which occurred when he was approximately 17 years old. He was sentenced to eight years imprisonment for the robbery. The Ontario Court of

Appeal dismissed his appeal. Majority judgment was given by Mr. Justice Jessup who said in part (pages 538,539):

> "The appeal is on all fours with the appeal in R.v. Gugic [unreported]. In that case the Court said:
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> 'On the credit side of the story the appellant is a 37-year-old immigrant from Yugoslavia, who had an unfortunate childhood and youth by reason of war conditions. He has had an exemplary work, marital, and community record except for one conviction in 1968 on an offence of possession of stolen property.'
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> However, the Court held in that case:
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> 'In our view, in a case of armed robbery where the weapon is loaded and particularly where the weapon has been sawed-off to make it more deadly, the sentencing factor of rehabilitation must yield to that of general deterrence. We would subscribe to what was said for the Court by Evans, J.A., in R. v. Sullivan (1972), 9 C.C.C. (2d) 70:'
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> "We are all of the opinion that a sentence of 10 years is a proper sentence in the normal case of armed robbery and wish to reaffirm the policy of the Court that a heavy sentence is required in cases of armed robbery to act as a deterrent to others."
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> 'Of course, there can be nothing magical in the figure of 10 years. Each case must be determined upon its own facts, but the dominant factor in the situation is that the appellant was armed with a deadly weapon which was loaded. It is quite a different case when a man is armed with an unloaded weapon.'
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> In this case the weapon was not only loaded but there was a live round in the breach indicating an intention to use the weapon with deadly purpose if the necessity and opportunity arose at the same time. Moreover, the appellant had travelled from Montreal with a criminal of that city to commit armed robbery here.

> Having regard to the nature of the offence, the potentiality of serious physical injury, the planning and deliberation involved and the other circumstances, we see no error in principle in the sentence imposed. It is a case where the principle of general deterrence demands emphasis."

In R. v. Allison and Dinel, supra, the facts were strikingly similar to those of the present case. During the course of robbing a jewellery store one of the accused shot the proprietor in the stomach with a shotgun. Fortunately no permanent injury was sustained. The two offenders were each sentenced to eight years for the robbery and to a consecutive two year term for using a firearm. Their appeal against sentence was rejected by the Ontario Court of Appeal. Speaking for the court Mr. Justice Martin said (page 41):

> "...It was urged upon us that, having regard to the age of the appellants, 22 and 18, that the sentence was excessive. Having regard, however, to the enormity of the offence involving the discharge of a sawed-off shotgun at the complainant by Allison, after having been told by Dinel 'shoot him', we are unable to say that the sentence was not a fit one."

Earlier in these reasons I speculated that because of the existance of the third and fourth counts perhaps the Crown and defence position had been that the act of shooting was not done in furtherance of the robbery. It may well however have been done to facilitate Mr. Grandy's escape after his companions had fled the scene. In any event the act of shooting at Mr. Roberts certainly aggravates the situation and to my mind is a factor that may

properly be reflected in the sentence imposed for the robbery.

I have considered the objective and subjective gravity of this offence of robbery against the background and circumstances of the Respondent. In light of such considerations and supported by the authorities to which I have referred and the relevant principles of sentencing it is my opinion that a fit and proper sentence for such offence is one of nine years imprisonment.

I turn now to consideration of the fitness of the sentence of imprisonment of one year imposed upon Mr. Grandy for violation of s. 83 of the Code. This section reads as follows;

> "83.(1) Every one who uses a firearm
> (a) while committing or attempting to commit an indictable offence, or
> (b) during his flight after committing or attempting to commit an indictable offence,
>
> whether or not he causes or means to cause bodily harm to any person as a result thereof, is guilty of an indictable offence and is liable to imprisonment
> (c) in the case of a first offence under this subsection, except as provided in paragraph (d), for not more than fourteen years and not less than one year; and
> (d) in the case of a second or subsequent offence under this subsection, or in the case of a first such offence committed by a person, who prior to coming into force of this subsection, was convicted of an indictable offence or an attempt to commit an indictable offence, in the course of which or during his flight after the commission or attempted commission of which he used a firearm, for not more than fourteen years and not less than three years.
>
> (2) A sentence imposed on a person for an offence under subsection (1) shall be served consecutively to any other punishment imposed on him for an offence arising out of the same event or series of events and to any other sentence to which he is subject at the time the sentence is imposed on him for an offence under subsection (1)."

In this case the accused and his two companions carried out a robbery armed respectively with a sawed-off shotgun, a knife and a baseball bat. Both the gun and the bat were used during the course of the incident. In my opinion this was a flagrant violation of s. 83 of the Code and I would therefore vary the sentence for such offence from one to three years imprisonment. Indeed if it was not for the totality principle I would have considered a custodial sentence in the five year range for this particular offence.

I would not disturb the sentences imposed by Mr. Justice Nunn with respect to the third and fourth counts. I would add that to my mind the sentences imposed for those offences are inadequate but the totality principle precludes any upward variation of them by this court.

On the sentencing hearing s. 98(1) of the Code was not brought to the attention of Mr. Justice Nunn. This section provides:

> "98.(1) Where a person is convicted of an indictable offence in the commission of which violence against a person is used, threatened or attempted and for which the offender may be sentenced to imprisonment for ten years or more or of an offence under section 83, the court shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting him from having in his possession any firearm or any ammunition or explosive substance for any period of time specified in the order that commences on the day the order is made and expires not earlier than
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> (a) in the case of a first conviction for such an offence, five years, and
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> (b) in any other case, ten years,
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> after the time of his release from imprisonment after conviction for the offence."

The Crown has now applied for a prohibition order under this section and the application is not opposed by counsel for the Respondent. An order shall therefore go prohibiting Mr. Grandy from having in his possession any firearm for a term of five years. Such term will commence on and not before the date Mr. Grandy is released from custody.

In the result I would grant the application for leave to appeal against sentence, allow the appeal and vary the sentence for the robbery offence from four to nine years and that for the violation of s. 83 of the Code from one to three years. These sentences shall be served consecutively to each other and consecutively to any other sentence the Respondent may now be under.

Angus L. Macdonald.
J.A.

Concurred in:

Pace, J.A.

Matthews, J.A.

S.C.C. NO. 01275

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APPEAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

LLOYD FRANCIS GRANDY

REASONS FOR JUDGMENT BY MACDONALD, J.A.